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STATE INTEREST AS THE MAIN IMPETUS FOR U.S. ANTITRUST EXTRATERRITORIAL JURISDICTION: RESTRAINT THROUGH PRESCRIPTIVE COMITY

ABSTRACT

*The twenty-first century saw a rapid surge in competition law legislation and enforcement, resulting in higher fines and penalties, some ranging in the billions. Enforcement of competition law by various governments increased and cooperation between those governments resulted in the normalization of competition law enforcement and higher fines and penalties. Beginning with the United States, many states began to actively seek extraterritorial application of domestic competition laws against foreign entities. Though this may have a deterrent effect against anti-competitive conduct, it also has negative implications for smaller economies that lack the motive and ability to enforce competition laws. Most, if not all, of the top enforcers of competition laws had a point in time when their domestic companies could grow with little to no impediments from strong competition laws. Today, with the normalization of competition law, smaller economies are given less opportunities to grow in a similar environment with little to no competition laws. This Comment argues that although competition law carries with it a strong moral undertone with certain compelling socio-economic policies, competition law was formed and developed according to strong domestic economic interests. These interests do not take into consideration the interests of smaller economies that might fare better with less competition law enforcement. Although the U.S. government did try to narrow the extraterritorial application of U.S. competition law, those attempts were mostly superficial. This Comment proposes that the U.S. Courts, Congress, and competition authorities revisit the principle of international comity laid out by Justice Scalia's dissent in *Timberlane Lumber Co. v. Bank of America, N.T. and S.A.* to prevent competition law from becoming a protectionist tool that protects its domestic interests at the expense of the economic growth of smaller economies.*

INTRODUCTION

Extraterritorial application of U.S. antitrust laws has been one of the most controversial issues in the debate concerning competition laws. Meanwhile, the

extraterritorial reach of U.S. antitrust laws, along with those of the European Union, Canada, South Korea, and Japan has continued to increase. In 2006, a Samsung Electronics Company executive from Korea agreed to plead guilty to price-fixing conspiracy, serve jail time in the United States, and pay fines.¹ Furthermore, 2015 marked a major event in the history of antitrust extraterritorial jurisdiction: the U.S. Department of Justice secured the extradition of an Italian citizen from Germany for antitrust charges.² This was the first time a foreign citizen was extradited to the United States solely for violating the Sherman Antitrust Act, and the U.S. government praised the extradition as a result of effective international cooperation for a common cause of justice.³

Legal terms such as “conspiracy” and “fraud” give competition antitrust laws a strong moral undertone. However, competition laws throughout the world, including those of the United States, carry strong economic policies that preserve the interests of the state.⁴ These policies have negative potential implications for weaker and smaller states, which have fewer incentives and less ability to enforce antitrust laws within and beyond their domestic borders.⁵

This Comment will attempt to substantiate these implications by showing that the increasing extraterritorial application of competition laws is motivated mainly by state economic interests. Part I will discuss the development of U.S. antitrust extraterritorial jurisdiction. Part II of this Comment will discuss how other states began to imitate the American model of extraterritorial jurisdiction and how they entered into cooperative agreements to enforce these laws. Part III will show that cooperation between states was motivated largely by state economic interests and limited to developed states, and that smaller states and/or less developed states are at a great disadvantage under these global antitrust regimes. Part IV discusses the negative implications that extraterritorial application of antitrust laws has on smaller and developing economies, and further explores the issue through a case study of Korean antitrust law. Finally, Part V will attempt to provide a solution using the

¹ *Samsung Korean Executive Agrees to Plead Guilty, Serve Jail Time for Participating in DRAM Price-Fixing Conspiracy*, U.S. DEP'T OF JUST. (Dec. 21, 2016), https://www.justice.gov/archive/atr/public/press_releases/2006/220464.htm.

² *First Ever Extradition on Antitrust Charge*, U.S. DEP'T OF JUST. (Apr. 4, 2014), <https://www.justice.gov/opa/pr/first-ever-extradition-antitrust-charge>.

³ *Id.*

⁴ See *infra* Part III.

⁵ See *infra* Part IV.

“prescriptive comity” principles laid out by Justice Scalia in his dissent in *Timberlane Lumber Co. v. Bank of America, N.T. and S.A.*

I. FROM RESTRAINT OF EXTRATERRITORIAL APPLICATION TO EXTRATERRITORIAL CRIMINAL PROSECUTION⁶

The United States was not always aggressive in its application of competition laws against foreign entities.⁷ As discussed below, before 1945, U.S. courts used the *strict territoriality approach* to limit U.S. antitrust law application to domestic jurisdictions.⁸ However, following World War II, U.S. courts developed a more liberal approach—the *intended effects test*.⁹ This new test soon met much opposition, and the U.S. courts retreated from the *intended effects test* by applying *international comity principles*.¹⁰ This restraint was short-lived, however; the courts quickly adopted the *substantial effects test*, which is still used today.¹¹ Every time the U.S. courts developed a more liberal test for broader extraterritorial application, there were important historical and political developments in the background.¹² This Part discusses these legal developments and puts them in the context of the historical and political developments at that time.

A. American Banana: *Strict Territoriality Test*

In *American Banana Co. v. United Fruit Co.*, Justice Holmes refused to apply the Sherman Act to conduct that occurred entirely outside of the United States.¹³ The defendant was a New Jersey corporation in the banana industry.¹⁴

⁶ This Comment will not discuss or differentiate between the various types of antitrust laws. For purposes of this Comment, it is sufficient to know that U.S. antitrust law provisions are primarily found in the Sherman and Clayton Acts. See *The Antitrust Laws*, FED. TRADE COMM’N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited Feb. 3, 2017). Both civil and criminal action can be taken under the Sherman Act. See Gregory J. Werden, *Sanctioning Cartel Activity: Let the Punishment Fit the Crime*, 5 EUR. COMPETITION J. 22–23 (2009). Cartel activities, such as price-fixing, bid-rigging, and market allocation schemes are more serious activities that may constitute a felony under the Sherman Act. *Id.* at 23. The Clayton Act specifies certain conduct not mentioned by the Sherman Act and does not carry with it any criminal penalties. *The Antitrust Laws*, *supra*; see also Thomas C. Arthur, *The Core of Antitrust and the Slow Death of Dr. Miles*, 62 SMU L. REV. 437, 447 (2009).

⁷ See generally *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

⁸ See *infra* Part I.A.

⁹ See *infra* Part I.B.

¹⁰ See *infra* Part I.D.

¹¹ See *infra* Part I.E.

¹² See *infra* Parts I.C. & I.F.

¹³ *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 358 (1909).

¹⁴ *Id.* at 354.

The Court found that the defendant was involved in various anticompetitive conduct with the intent to prevent competition and monopolize the banana trade.¹⁵ The defendant had purchased the business of several competitors with provisions against resuming trade and had contracted with other banana businesses to regulate prices and acquire controlling amounts of stock.¹⁶ It even created a selling company that sold bananas at fixed prices.¹⁷ After the plaintiff operated a banana plantation in Panama and built a railway in Colombia, the defendant instigated the Costa Rica authorities to take over the plantation and the railroad.¹⁸ Then, a third party received an ex parte order from a Costa Rican court declaring him as the owner of the plantation, and the defendant purchased the plantation from the third party.¹⁹ As a result, the plaintiff was driven out of business.²⁰ The plaintiffs alleged that the defendant's acts not only affected its plantation operations and supplies but also drove purchasers out of the market.²¹ It could thus be argued that the primary effects of the defendant's conduct were felt in the U.S. market, and that, therefore, the Sherman Act applied in that case.

Despite these actions that clearly violated the Sherman Act, Justice Holmes applied what was later called the *strict territoriality approach*.²² Calling it "the general and almost universal rule," he explained that the legislation was *prima facie territorial*.²³ In other words, the operation and effect of a statute was to be restricted to the territorial limits over which the lawmaker had legitimate power.²⁴

One might wonder why the Supreme Court did not rule against this egregious conduct that clearly violated the Sherman Act. At that point in time, however, it seems that the Supreme Court was concerned that applying its own standards on other foreign states would interfere with the sovereignty of other nations.²⁵

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 354–55.

¹⁹ *Id.* at 355.

²⁰ *Id.*

²¹ *Id.*

²² See Mark S. Popofsky, *Extraterritoriality in U.S. Jurisprudence*, in 3 ISSUES IN COMPETITION LAW AND POLICY 2420 (ABA Section of Antitrust Law 2008).

²³ *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356–57 (1909).

²⁴ *Id.* at 357.

²⁵ *Id.* at 356.

B. Alcoa: *Intended Effects Test*

Holmes' *strict territoriality approach* did not survive the changing tides of world politics following World War II. In 1945, Judge Learned Hand in the Second Circuit Court of Appeals applied what was called the *intended effects test* in *United States v. Aluminum Co. of America (Alcoa)*.²⁶ In *Alcoa*, Aluminum Co. of America (Alcoa), a U.S. corporation, and Aluminum Limited, a Canadian corporation formed to "take over those properties of 'Alcoa' which were outside the United States,"²⁷ were involved in a price-fixing and market division agreement, which Alliance, a Swiss corporation, executed.²⁸ Because the alleged conduct occurred outside of the United States, the court had to answer the question of whether, with the Sherman Act, "Congress intended to impose the liability [for such acts], and whether [the U.S.] Constitution permitted it to do so."²⁹

Judge Learned Hand held that Aluminum Limited's conduct fell within the purview of the Sherman Act. Citing to *American Banana*, he recognized that the scope of U.S. laws was not unlimited.³⁰ However, he held that U.S. laws could reach conduct outside the United States by foreign persons if the conduct had consequences within the United States that were forbidden by its laws.³¹ The *intended effects test* was that the Sherman Act applied to conduct outside the United States by foreign persons if (1) the person intended to affect U.S. imports and (2) such conduct had prohibited effects in the United States.³² The threshold to satisfy this *intended effects test* was not very high, especially for the prohibited effects requirement.³³ When discussing the actual effects of the

For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.

Id.

²⁶ *U.S. v. Aluminum Co. of America*, 148 F.2d 416, 443–44 (2d Cir. 1945). The Second Circuit was sitting as the court of last resort for the Supreme Court, which had lacked a quorum. Peter Lattman, *Law Blog History Lesson: United States v. Alcoa*, WALL ST. J.: L. BLOG (May 8, 2007), <http://blogs.wsj.com/law/2007/05/08/law-blog-history-lesson-united-states-v-alcoa/>.

²⁷ *See U.S. v. Aluminum Co. of America*, 148 F.3d at 421, 439.

²⁸ *See id.* at 421, 442.

²⁹ *See id.* at 443.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 443–45.

³³ *See id.* at 444–45.

prohibited conduct, Judge Learned Hand held that the burden was met even without proof that prices were affected.³⁴

C. From American Banana to Alcoa: A Historical Perspective

This substantial change in law was not completely independent of the socio-political circumstances at that time. The transition from *American Banana* to *Alcoa* was a gradual one during the period between World War I and World War II. U.S. antitrust enforcement during World War I reveals that the increase in antitrust enforcement was motivated in part by state interests and the *Alcoa* decision was made in 1945 when the United States had fully established itself as a global leader after World War II.

In the 1912 presidential campaign debates between Roosevelt, Wilson, and Taft, the threat of trusts (which are combinations of competitors to create monopoly power) was one of the leading issues.³⁵ Two years later, the Clayton Act was passed to further enforce actions against anticompetitive conduct.³⁶ Shortly after this groundbreaking statute, World War I broke out, providing the Wilson administration with a prime opportunity for antitrust enforcement.³⁷ During the war, German agents attempted to disrupt the export of U.S. war materials to the allied forces.³⁸ With the Sherman Act in hand, the Wilson administration thwarted such efforts by prosecuting the agents under Section One of the Sherman Act.³⁹

Antitrust enforcement against U.S. corporations looked very different. Instead of imposing more stringent enforcement pursuant to earlier efforts by the legislature, the government not only decided to relax its antitrust enforcement but also encouraged U.S. competitors to collaborate in support of the war efforts.⁴⁰ The Attorney General at the time, Thomas Watt Gregory, went as far as consulting with Chief Justice White to suspend major antitrust cases until the end of the war.⁴¹

³⁴ *Id.* at 445 (citing *Apex Hosiery Co. v. Leader*, 310 U.S. 469, which held that no proof of effect on prices was necessary because an agreement to withdraw a substantial part of the supply from the market would have some effect on prices).

³⁵ Arthur, *supra* note 6, at 441–47.

³⁶ *Id.* at 47.

³⁷ Thomas K. Fisher, *Antitrust During National Emergencies: I*, 40 MICH. L. REV. 969, 988 (1942).

³⁸ *See id.* at 988–89.

³⁹ Richard M. Steuer & Peter A. Barile III, *Antitrust in Wartime*, 16 ANTITRUST 71, 71 (2002).

⁴⁰ *See id.* at 71–72.

⁴¹ *Id.* at 72.

After World War I and leading up to Pearl Harbor, the Antitrust Division of the Department of Justice began taking enforcement measures under the Sherman Act at a record pace.⁴² The head of the Antitrust Division in 1944, Wendell Berge, stated that cartel arrangements between German and U.S. companies had “deprived the Nation of reserves of capacity and skill for the war effort.”⁴³ Some examples include the division of world markets in military optical instruments in the *Bausch & Lomb* case and the cartel arrangement between Standard Oil of New Jersey and I.G. Farbenindustrie of Germany.⁴⁴

Alcoa emerged as a major antitrust case during robust anti-cartel enforcement by the government, when it was more than certain that the allies would win World War II.⁴⁵ With the imminent victory of the war and the supremacy of U.S. power established in international politics, the United States was now empowered to protect its market from conduct outside of its borders.⁴⁶

In “The Extraterritorial Effects of Antitrust Laws,” French-Canadian scholar Jean-Gabriel Castel explained that Judge Learned Hand’s *intended effects test* did not violate the Holmes territoriality approach because the effects in the territory themselves could be considered to satisfy the territoriality requirement.⁴⁷ In the context of this rationale, *Alcoa* did not seem like a farfetched leap from *American Banana*. Thus, the *intended effects test* came to be nationally accepted, and the Department of Justice not only continued but also strengthened its extraterritorial application of the Sherman Act.⁴⁸ Such aggressive extraterritorial application of antitrust laws led to significant foreign backlash, which is further discussed in Part II.A.⁴⁹

⁴² *Id.*

⁴³ Wendell Berge, *Antitrust Enforcement in the War and Postwar Period*, 12 GEO. WASH. L. REV. 371, 372–73 (1944).

⁴⁴ *Id.*

⁴⁵ See *A Brief History of the U.S. Army in World War II*, CTR. OF MIL. HIST. U.S. ARMY, http://www.history.army.mil/html/books/072/72-2/cmh_pub_72-2.pdf (last visited Feb. 3, 2017).

⁴⁶ Susan E. Burnett, *U.S. Judicial Imperialism Post Empagran v. F. Hoffmann-Laroche? Conflicts of Jurisdiction and International Comity in Extraterritorial Antitrust*, 18 EMORY INT’L L. REV. 555, 571 (2004).

⁴⁷ Jean-Gabriel Castel, *The Extraterritorial Effects of Antitrust Law*, in 179 RECUEIL DES COURS 32 (1983).

⁴⁸ Won-Ki Kim, *The Extraterritorial Application of U.S. Antitrust Law and its Adoption in Korea*, 7 SING. J. INT’L & COMP. L. 386, 390 (2003).

⁴⁹ *Id.*

D. A Step Away from the Intended Effects Test

Following much critique and opposition due to the obscurity of the *intended effects test* and the overreach of extraterritorial jurisdiction, the U.S. government and courts began to set limitations by taking into consideration the doctrine of international comity in the 1970s. One notable judicial decision was *Timberlane Lumber Co. v. Bank of America, N.T. and S.A.*, which was followed by the Foreign Trade Antitrust Improvement Act (FTAIA).

1. Timberlane—International Comity

In *Timberlane*, the defendants were sued for conspiring to prevent the plaintiff from milling lumber in Honduras to export to the United States.⁵⁰ Rather than applying the *intended effects test*, the Ninth Circuit applied an *interest balancing test* with “the jurisdictional rule of reason.”⁵¹ The court recognized that many nations resented and protested the assertion of U.S. jurisdiction over foreign entities and their conduct outside the United States.⁵² It found that the *Alcoa intended effects test* “by itself is incomplete because it fails to consider other nations’ interest,”⁵³ and does not “take into account the full nature of the relationship between the actors and this country.”⁵⁴ Citing to the Restatement (Second) of Foreign Relations Law, which required that each state moderate the exercise of its enforcement jurisdiction, the Ninth Circuit Court explained in a footnote that the “jurisdictional forbearance” in the Restatement was “more a question of comity and fairness than one of national power.”⁵⁵ It provided a tripartite test asking the following questions:

- (1) Was there an intended or actual effect on the foreign commerce of the United States?⁵⁶
- (2) Was the effect sufficiently large to present a cognizable injury to the plaintiff?⁵⁷

⁵⁰ *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 601 (9th Cir. 1976).

⁵¹ *Id.* at 613–14.

⁵² *Id.* at 609.

⁵³ *Id.* at 611–12.

⁵⁴ *Id.* at 612.

⁵⁵ *Id.* at 613, n.27.

⁵⁶ *Id.* at 613.

⁵⁷ *Id.*

- (3) Are the interests of and link to the United States sufficiently strong vis-à-vis those of other nations to justify an assertion of extraterritorial authority?⁵⁸

While the first two questions are a repetition of the *Alcoa intended effects test*, the third question considers the doctrine of international comity to limit the extraterritorial reach of U.S. antitrust laws.⁵⁹ The Ninth Circuit listed the following factors to weigh when answering this question:

- (1) “the degree of conflict with foreign law or policy,”⁶⁰
- (2) “the nationality or allegiance of the parties and the locations or principal places of business or corporations,”⁶¹
- (3) “the extent to which enforcement by either state can be expected to achieve compliance,”⁶²
- (4) “the relative significance of effects on the United States as compared with those elsewhere,”⁶³
- (5) “the extent to which there is explicit purpose to harm or effect,”⁶⁴
and
- (6) “the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.”⁶⁵

Subsequent to *Timberlane*, the Third Circuit in *Mannington Mills, Inc. v. Congoleum Corp.* also took international comity principles into consideration when determining extraterritorial jurisdiction of U.S. antitrust laws.⁶⁶ Not all courts agreed, however. The United States Court of Appeals for the District Court of Columbia criticized the *Timberlane* balancing test, holding that courts were not equipped to weigh foreign policy considerations.⁶⁷

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 614.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Burnett, *supra* note 46, at 574.

⁶⁷ See *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 949–50 (D.C. Cir. 1984) (“This court is ill-equipped to ‘balance the vital national interests of the United States and the [United

2. FTAIA—Substantial and Direct Requirement

Unlike *Timberlane*, Congressional efforts to balance the overreaching effects of the *intended effects test* were beneficial only to U.S. exporters. In 1982, Congress amended the Sherman Act by adopting the FTAIA.⁶⁸

During the passage of this law, two types of entities voiced their concerns about the developing U.S. law in antitrust enforcement: U.S. exporting businesses and foreign businesses.⁶⁹ Since U.S. exporters clearly fell under U.S. antitrust laws, they complained that they had to compete with their hands tied while foreign rivals were not so constrained.⁷⁰ In other words, they wanted to legitimately organize collusive export ventures that did not harm U.S. consumers. At the same time, foreign governments and foreign traders voiced their concerns about judicial overreach by subjecting foreign businesses and their conduct outside the United States under their jurisdiction.⁷¹

Although the FTAIA on its face seemed like it was limiting the extraterritorial application of antitrust laws, it was actually protecting U.S. exporters while allowing the continued extraterritorial application of U.S. antitrust laws on foreign business. The FTAIA states that “Sections 1 to 7 of [Title 15] shall not apply to conduct involving trade or commerce.”⁷² But the various exclusions it provides substantially limit foreign plaintiffs’ claims against U.S. businesses while allowing many exceptions for U.S. entities to bring claims against foreign businesses.⁷³ The FTAIA seems to restrict the application of extraterritorial jurisdiction of the Sherman Act by specifying that the effect must be “substantial” and “direct” in character.⁷⁴ However, the vague requirement that the effect be “foreseeable” rather than intended did not

Kingdom] to determine which interests predominate.” *Id.* (quoting *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1148 (N.D. Ill. 1978)).

⁶⁸ Edward T. Swaine, *Cooperation, Comity, and Competition Policy: United States*, in COOPERATION, COMITY, AND COMPETITION POLICY 3, 7 (Andrew T. Guzman ed., 2011).

⁶⁹ Edward D. Cavanagh, *The FTAIA and Empagran: What Next?*, 58 SMU L. REV. 1419, 1420–21 (2005).

⁷⁰ *Id.* at 1420.

⁷¹ *Id.* at 1420–21.

⁷² 15 U.S.C. § 6a (2006).

⁷³ The exclusion does not apply to “import trade or import commerce” where such conduct has a direct, substantial, and foreseeable effect on U.S. commerce, and where the person engaged in such conduct is in the United States. 15 U.S.C. § 6a (2006). In other words, U.S. antitrust laws do not apply to foreign plaintiffs when the defendant’s conduct does not have a substantial and direct effect on U.S. commerce, but any claims against foreign businesses who export to the U.S. fall under the purview of U.S. antitrust laws.

⁷⁴ *See id.*

limit extraterritorial application of U.S. antitrust laws over foreign businesses but rather caused more confusion for potential foreign defendants.⁷⁵ Thus, whether Congress intended it or not, the FTAIA benefitted U.S. exporters yet did not adequately address the concerns of the foreign governments and foreign businesses.

E. A Step Back to the Intended Effects Test: the Hartford Fire Substantial Effects Test

The division between the *Alcoa intended effects test* and the *Timberlane balancing test* was soon put to an end in 1993 with *Hartford Fire Insurance Co. v. California*.⁷⁶ Nineteen U.S. states and private plaintiffs filed complaints against domestic primary insurers, trade associations, reinsurance brokers, and London-based domestic reinsurers.⁷⁷ The plaintiffs alleged that the defendants had violated Section One of the Sherman Act by agreeing to boycott general liability insurers that used nonconforming forms.⁷⁸ The actions were consolidated for litigation, but the Northern District of California granted the London-based defendants' motion to dismiss, invoking the principle of international comity found in *Timberlane*.⁷⁹ The Court of Appeals reversed, concluding that the principle of international comity did not necessarily bar liability under the Sherman Act.⁸⁰

Rather than upholding or rejecting the comity concerns altogether, the Supreme Court held that comity considerations applied only when there was a "true conflict between domestic and foreign law."⁸¹ Citing to the Restatement (Third) of Foreign Relations Law, the court held that there is no "true conflict" if the defendant is able to comply with both sets of laws.⁸² Thus, the court held that there was no need to apply the international comity considerations and instead reformulated the *Alcoa intended effects test* into a *substantial effects test*.⁸³

⁷⁵ See Cavanagh, *supra* note 69, at 1423–28.

⁷⁶ See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

⁷⁷ *Id.* at 764.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 778–79.

⁸¹ *Id.* at 798.

⁸² *Id.* at 799.

⁸³ *Id.*

Without elaborating on when a true conflict between domestic and foreign law exists, it is questionable whether the rule has any restraining effect at all. The decision in *Hartford Fire* not only failed to clarify the proper test in applying extraterritorial jurisdiction under U.S. antitrust laws but also resulted in one of the inherent tensions of the international competition regime.⁸⁴ Under *Hartford Fire*, if the domestic laws of two different states apply to the same international activity, then both states may have jurisdiction.⁸⁵ As a practical matter, of course, the stricter set of laws will always govern in situations where jurisdictions overlap.⁸⁶

F. Preparing for Hartford Fire: The Clinton Administration's Activism

Hartford Fire was decided subsequent to a growing extraterritorial antitrust activism during the Clinton administration. Prior to *Hartford Fire*, the U.S. Department of Justice (DOJ) had released the 1988 Guidelines, the Antitrust Enforcement Guide of International Operations, which proposed that extraterritorial jurisdiction should be applied only when foreign anticompetitive conduct affected American consumers.⁸⁷ In addition, the DOJ added footnote 159 to limit extraterritorial application of antitrust laws only to those situations where there was a threat to American consumers by reducing output or raising prices.⁸⁸ However, in the wake of *Hartford Fire*, footnote 159 was repealed in 1992 and the DOJ indicated that it would take "action against conduct occurring overseas that restrains United States exports, whether or not there is direct harm to U.S. consumers"⁸⁹ The target of this change in policy was Pilkington, a British company, which the DOJ claimed had a dominant position worldwide in the glass manufacturing industry.⁹⁰ Although Pilkington did use restrictive licensing practices to maintain its monopolistic position, the harm was to U.S. exporters in third-country markets rather than to U.S. consumers.⁹¹

⁸⁴ Andrew Guzman, *Competition Law and Cooperation: Possible Strategies*, in COOPERATION, COMITY, AND COMPETITION POLICY 346, 349 (Andrew Guzman ed., 2011).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Kim, *supra* note 48, at 398.

⁸⁸ *Id.* at 398–99.

⁸⁹ *Id.* at 399.

⁹⁰ Robert E. Litan & Carl Shapiro, *Antitrust Policy in the Clinton Administration*, in AMERICAN ECONOMICS POLICY IN THE 1990'S 435, 478 (Frankel & Orszag ed., 2000).

⁹¹ *Id.* at 480.

The newly revised Guidelines in 1995 stated that the DOJ would assert jurisdiction both under the *Hartford Fire* test in cases involving import commerce and the FTAIA test for cases of export commerce or wholly foreign conduct.⁹² However, the new Guidelines seemed more aggressive, having a tone of warning rather than that of guidance.⁹³ They stated that the DOJ intended to actively pursue activities that occur abroad and adversely affect U.S. markets or damage U.S. exporting opportunities.⁹⁴

Although the agencies stressed that they would take into account concerns of “international comity,” the Guidelines did not state what weight the various factors would have in determining extraterritorial jurisdiction.⁹⁵ Rather, they stated that when the United States decides to prosecute an antitrust action, the decision represents a determination by the executive branch that the enforcement of the antitrust action outweighs any other foreign policy concerns.⁹⁶ This shows not only that the Supreme Court’s *Hartford Fire* rule failed to restrain extraterritorial application of antitrust laws, but also that the agencies’ evaluation of comity concerns by U.S. enforcing agencies has been substantially independent from that of U.S. courts.⁹⁷

In addition, it is noteworthy that the Clinton Administration was the first U.S. administration to begin its term after the collapse of the Soviet Union and the end of the Cold War. In his inaugural address, President Clinton said: “When our vital interests are challenged, or the will and conscience of the international community defied, we will act—with peaceful diplomacy whenever possible, with force when necessary.”⁹⁸ As *Alcoa* coincided with the victory of the United States in World War II and its emergence as one of the main players in the international community, *Hartford Fire* coincided with the United States’ emergence as the sole hegemon.

1. Nippon: Criminal Antitrust Extraterritorial Application

Finally, in 1997, the First Circuit upheld the conviction of two foreign defendants for price-fixing resulting from conduct wholly outside the United

⁹² Kim, *supra* note 48, at 399.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 400.

⁹⁶ *Id.*

⁹⁷ Swaine, *supra* note 68, at 14.

⁹⁸ The Legacy of the Clinton Administration, AM. EXPERIENCE, <http://www.pbs.org/wgbh/americanexperience/features/general-article/clinton-legacy/> (last visited Feb. 3, 2017).

States.⁹⁹ In *U.S. v. Nippon Paper Industries Co.*, the defendant Japanese corporation and co-conspirators held meetings in Japan where they agreed to fix the price of their thermal fax paper throughout North America.¹⁰⁰ In its opinion, the court used language from *Hartford Fire* to explain that it was clearly established law that conduct having a substantial effect in the United States fell within the purview of the Sherman Act.¹⁰¹

Because of the confusing language of the FTAIA, the court refused to give it any weight and struck down various arguments made by the defendant.¹⁰² One of the arguments made by the defendant was the rule of lenity.¹⁰³ The court limited the application of the rule of lenity to cases where the Court had depleted all the sources to discern Congressional intent.¹⁰⁴ It dismissed the rule of lenity defense by stating that it was “well established” that Section One of the Sherman Act applied to wholly foreign conduct.¹⁰⁵ Also, addressing the defendant’s *Timberlane* comity concerns, the First Circuit dismissed the comity principle as merely “an aspiration [rather] than a fixed rule, more a matter of grace than a matter of obligation.”¹⁰⁶ Thus, extraterritorial application of antitrust law was extended to criminal prosecutions under the Sherman Act, opening a new era of criminal enforcement against foreign entities.¹⁰⁷

II. FROM RESENTMENT TO COOPERATION

Following the *Alcoa* decision, none of the nearly 250 foreign antitrust actions brought by the DOJ had been dismissed under the *intended effects test*.¹⁰⁸ As a result, foreign states began adopting “blocking” statutes. Some of these frustrated U.S. application of antitrust laws by preventing discovery, requiring foreign courts to refuse recognition of treble-damages awards, and

⁹⁹ See generally *U.S. v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997).

¹⁰⁰ See *id.* at 1.

¹⁰¹ *Id.* at 5.

¹⁰² *Id.*

¹⁰³ *Id.* at 8–9.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 9.

¹⁰⁶ *Id.*

¹⁰⁷ Total criminal fines from antitrust division investigations increased from \$369 million in 2004 to \$3.56 billion in 2015. GIBSON DUNN, 2015 MID-YEAR CRIMINAL ANTITRUST AND COMPETITION LAW UPDATE (July 13, 2015), <http://www.gibsondunn.com/publications/documents/2015-Mid-Year-Criminal-Antitrust-and-Competition-Law-Update.pdf>.

¹⁰⁸ Swaine, *supra* note 68, at 10.

permitting defendants to receive “clawback” judgments,¹⁰⁹ which allow defendants to retrieve the damages award they paid in their home courts.¹¹⁰ However, members of the international community began changing their approach; instead of resisting, they began to formulate their own antitrust laws. Bilateral and multilateral agreements gave rise to cooperative regimes to harmonize and enforce antitrust laws. However, the effects of these regimes were limited to common interests between states.

A. *Foreign Counteractions against U.S. Antitrust Laws*

After the Seventh Circuit Court asserted jurisdiction over Australia, Canada, Great Britain, and South Africa in a uranium price-fixing case, the *Westinghouse* litigation, the foreign states passed blocking statutes.¹¹¹ The British Parliament passed the Shipping Contracts and Commercial Documents Act, which “authorized a Minister of the British Government to order British citizens not to comply with certain discovery requests from foreign States.”¹¹² The Canadian government also adopted a similar blocking statute by adopting a Uranium Information Security Regulation, which “prohibit[ed] a person from releasing any written matter or documentation relating to any phase of uranium mining, refining or marketing . . . unless required to do so by Canadian law, or by the Minister of Energy, Mines and Resources.”¹¹³ The Australian government passed the Australian Foreign Antitrust Judgments Act providing that a judgment of a foreign court under antitrust law should not be satisfied if the Attorney General determined that it was inconsistent with international law or comity, or was not in the national interest.¹¹⁴

B. *Development of Stricter Antitrust Laws in Foreign States*

While the United States was initially the most aggressive in expanding the reach of its antitrust laws, other nations began to reciprocate U.S. antitrust

¹⁰⁹ *Id.*

¹¹⁰ UK’s Protection of Trade Interests Act allows the defendant “to recover from the party in whose favour the judgment was given so much of the [foreign damages award] as exceeds the part attributable to compensation.” Protection of Trading Interests Act 1980, c. 11, § 6(2) (UK).

¹¹¹ Allan Fels & Zaven Mardirossian, *Cooperation, Comity, and Competition Policy in Australia*, in COOPERATION, COMITY, AND COMPETITION POLICY 164, 170 (Andrew Guzman ed., 2011).

¹¹² Castel, *supra* note 47, at 80.

¹¹³ *Id.* at 83–84.

¹¹⁴ Fels & Mardirossian, *supra* note 111, at 171.

extraterritorial jurisdiction.¹¹⁵ This change in attitude came with the increasingly global nature of business activity and the realization that international comity principles posed no significant obstacle to extraterritorial application of antitrust laws.¹¹⁶ The continuing liberalization of trade also encouraged the increasing number of competition statutes among various states.¹¹⁷

In particular, the EU began not only tolerating but also increasingly applying extraterritorial jurisdiction.¹¹⁸ Among other factors, the EU's growing role as an economic actor contributed to its boldness in applying its antitrust extraterritorial jurisdiction.¹¹⁹ Today, the EU is considered to be engaging in "unilateral regulatory globalization" known as "The Brussels Effect."¹²⁰

Although the European Court of Justice (ECJ) never explicitly affirmed the effects doctrine, it developed doctrines that emulated the tests formulated by U.S. courts.¹²¹ The Economic Entity Doctrine was used to assert jurisdiction over non-EU parent undertakings by attributing liability to them for the illegal price-fixing by their subsidiaries in the EU.¹²² The ECJ looked at the extent to which a non-EU parent undertaking controls its subsidiaries located in the EU to determine if a single economic entity was formed.¹²³ Because the court regarded the non-EU parent and its EU subsidiaries as a single economic entity, the non-EU undertaking fell within the scope of the EU competition law.¹²⁴ The EU also developed the Implementation Doctrine, which is based on the territoriality principle.¹²⁵ Under this doctrine, agreements and practices fall within the purview of Articles 101 and 102 of the Treaty on the Functioning of

¹¹⁵ Dorsey D. Ellis, Jr., *Projecting the Long Arm of the Law: Extraterritorial Criminal Enforcement of U.S. Antitrust Laws in the Global Economy*, 1 WASH. U. GLOBAL STUD. L. REV. 477, 499 (2002).

¹¹⁶ *Id.*

¹¹⁷ Jürgen Basedow, *International Antitrust: From Extraterritorial Application to Harmonization*, 60 LA. L. REV. 1037 (2000).

¹¹⁸ Joanne Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62 AM. J. COMP. L. 87, 88 (2014).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Geradin et al., *Extraterritoriality, Comity, and Cooperation in EU Competition Law*, in COOPERATION, COMITY, AND COMPETITION POLICY 21, 27–28 (Andrew Guzman ed., 2011).

¹²² *Id.* at 25.

¹²³ *Id.* at 26.

¹²⁴ *Id.*

¹²⁵ *Id.*

the European Union (TFEU)¹²⁶ if they are implemented within the EU and they affect trade between member states, regardless of their geographic origin.¹²⁷

Other states, such as Australia and South Korea, adopted similar approaches to extraterritorial application of antitrust laws. In Australia, although the government enacted the Trade Practices Act, which rejected the U.S. and Canadian models, it eventually adopted antitrust legislation modeled after U.S. antitrust legislation.¹²⁸ South Korea enacted the Monopoly Regulation and Fair Trade Act (MRFTA), which was also modeled after U.S. antitrust laws.¹²⁹ Today, the five most aggressive antitrust enforcement regimes are found in the EU, Brazil, Japan, South Korea, and the United States.¹³⁰ The EU is the leading entity in aggressive investigation of cartel activity. In 2014, it led the way in cartel fines, collecting over \$2 billion.¹³¹ In 2002, the Korean Fair Trade Commission (KFTC) made its first decision to apply extraterritorial jurisdiction in a case concerning international cartels.¹³² In January 2015, the KFTC made a record fine of \$123 million for bid-rigging.¹³³ For the first time, it also imposed prison terms on individuals for cartel offenses in 2014.¹³⁴ In other states, such as Brazil, the jail sentence for anticompetitive behavior has been increasing, with sentences sometimes exceeding ten years.¹³⁵

C. *International Cooperative Regimes for Antitrust Enforcement*

Along with an increasing application of extraterritorial jurisdiction of anti-competition laws, various states began cooperating and building global

¹²⁶ Articles 101 and 102 of the TFEU introduce rules related to the enforcement of EU competition policy. *Implementing EU Competition Rules: Application of Articles 101 and 102 of the TFEU*, EUR-LEX: ACCESS TO EUR. UNION L. (Sep. 26, 2015), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l26092>. It allows the competition authorities of EU member states to enforce competition rules previously applied by the European Commission. *Id.*

¹²⁷ Geradin et al., *supra* note 121, at 26.

¹²⁸ Fels & Mardrossian, *supra* note 111, at 178.

¹²⁹ Danny Abir, *Monopoly and Merger Regulation in South Korea and Japan: A Comparative Analysis*, 13 INT'L TAX & BUS. L. 143, 154 (1996).

¹³⁰ See ALLEN & OVERY, GLOBAL ANTITRUST ENFORCEMENT 2–3 (2014), [http://www.allenovery.com/SiteCollectionDocuments/Global_Antitrust_Enforcement_2014_\(Mid-Year\)_Report.pdf](http://www.allenovery.com/SiteCollectionDocuments/Global_Antitrust_Enforcement_2014_(Mid-Year)_Report.pdf).

¹³¹ MORGAN LEWIS, GLOBAL CARTEL ENFORCEMENT REPORT: EARLY 2015 1, 3 (Feb. 2015), http://www.morganlewis.com/~media/files/antitrust_cartelyearinreviewreport_feb20151.ashx.

¹³² Kim, *supra* note 48, at 409.

¹³³ GIBSON DUNN, 2014 YEAR-END CRIMINAL ANTITRUST AND COMPETITION LAW UPDATE 5 (Jan. 8, 2015), <http://www.gibsondunn.com/publications/documents/2014-Year-End-Criminal-Antitrust-and-Competition-Law-Update.pdf>.

¹³⁴ MORGAN LEWIS, *supra* note 131, at 8.

¹³⁵ See *id.*

antitrust regimes. This movement began after World War II, when states attempted to achieve harmonization through multilateral agreements and international organizations.

In 1947, the Havana Charter and the International Trade Organization began contemplating adding provisions for the regulation of business practices.¹³⁶ In the early 1950s, the United Nations (U.N.) Economic and Social Council continued discussions on formulating an international agreement on business practices as well. However, these international endeavors were rejected by the United States.¹³⁷ Although the “Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices” was adopted in 1980 with the efforts of developing countries, it did not have much meaningful effect due to the voluntary nature of the code.¹³⁸

The formation of the World Trade Organization (WTO) in the 1990s reignited efforts to harmonize antitrust laws and enforcement.¹³⁹ This time, leaders of the European Commission tried to incorporate competition law into the WTO regime, but failed due to opposition from both developing countries and the United States.¹⁴⁰ Following years of failed negotiations, the WTO decided not to hold discussions on competition law.¹⁴¹

However, the stalemate for international cooperation was broken with the strong support of U.S. interests through a different strategy.¹⁴² In 1997, U.S. Attorney General Janet Reno and Assistant Attorney General for Antitrust Joel Klein formed the International Competition Policy Advisory Committee (ICPAC).¹⁴³ This committee was commissioned to address worldwide antitrust problems and issued a report advising the creation of a “Global Competition Initiative” to realize a greater convergence of competition law, analysis, and common culture.¹⁴⁴ At the anniversary of the European Council Merger

¹³⁶ Damien Geradin, *The Perils of Antitrust Proliferation: The Globalization of Antitrust and the Risks of Overregulation of Competitive Behavior*, 10 CHI. J. INT’L L. 189, 193 (2010).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ David J. Gerber, *Economic Development and Global Competition Law*, in COMPETITION LAW AND DEVELOPMENT 13, 16 (D. Daniel Sokol et al. eds., 2013).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *History*, INT’L COMPETITION NETWORK, <http://www.internationalcompetitionnetwork.org/about/history.aspx> (last visited Feb. 3, 2017).

¹⁴⁴ *Id.*

Control Regulation in 2000, Mario Monti, then-European Commissioner for Competition, and Joel Klein expressed their support for the initiative.¹⁴⁵ Finally, in 2001, top officials from Australia, Canada, the EU, France, Germany, Israel, Japan, Korea, Mexico, South Africa, the United Kingdom, the United States, and Zambia launched the International Competition Network (ICN).¹⁴⁶

One of the main features of the ICN is that participation is voluntary.¹⁴⁷ Although almost all of the competition authorities in the world are represented in the ICN,¹⁴⁸ ICN initiatives and cooperation will only be effective when the case involves jurisdictions without contradictory interests. The voluntary nature of the ICN and the bilateral agreements discussed below are all efforts initiated by states with power to coordinate a more effective competition law enforcement regime according to the standards of each respective state.

The United States continued to build an international community that would help support its competition law initiatives by entering into bilateral and regional agreements with other nations, rather than using international organizations as a forum for discussion. Initially, the United States was not receptive to cooperation with other states,¹⁴⁹ as evidenced by its rejection of the recommendation of the Organisation for Economic Co-operation and Development (OECD) in 1967 to limit state enforcement actions in light of legitimate foreign interests.¹⁵⁰ Today, the United States has entered into anticompetitive bilateral agreements with Australia, Brazil, Canada, the European Union, Germany, Israel, Japan, Mexico, and Russia.¹⁵¹ Mutual legal assistance treaties (MLATs) are other important tools of cooperation.¹⁵² MLATs are bilateral agreements, which provide that each party will use its own criminal investigative resources to obtain information for an investigation being conducted by the other party.¹⁵³ To date, the United States has entered

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Michal S. Gal, *Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and Developing Jurisdictions*, 33 FORDHAM INT'L L.J. 1, 10 (2010) [hereinafter Gal, *Antitrust*].

¹⁴⁸ *Id.*

¹⁴⁹ Swaine, *supra* note 68, at 15.

¹⁵⁰ *Id.*

¹⁵¹ *Antitrust Cooperation Agreements*, U.S. DEP'T OF JUST., <https://www.justice.gov/atr/antitrust-cooperation-agreements> (last updated Aug. 17, 2016).

¹⁵² Brinkley Tappan & Stephen M. Byers, *Exporting US Antitrust Law: The DOJ's Increasing Focus on Asia*, 28 CRIM. JUST. 1, 2 (2003), <https://www.crowell.com/files/Exporting-US-Antitrust-Law-The-DOJs-Increasing-Focus-on-Asia.pdf>.

¹⁵³ *Id.*

into an MLAT agreement with twenty-six different states, including Australia, Canada, Japan, South Korea, and the UK.¹⁵⁴ There have also been cooperative efforts on a regional level. Some of the most notable multilateral agreements are the Asia-Pacific Economic Cooperation (APEC), where the United States is a key participant, and the North American Free Trade Agreement (NAFTA).¹⁵⁵ These agreements have gone beyond written form into action. Some of these coordinated efforts include cooperative dawn raids and the execution of search warrants in multiple jurisdictions.¹⁵⁶

Nonetheless, these agreements did not play a major role in harmonizing antitrust policies, but instead acted mostly as non-binding agreements.¹⁵⁷ And even those agreements that were binding only had some rudimentary coverage of competition policy matters.¹⁵⁸ Most importantly, these international agreements were not effective in restraining extraterritorial jurisdiction, but they did support cooperative efforts that were aimed towards reinforcing each state's interest by sharing information, coordinating dawn raids, and executing multi-jurisdictional search warrants.¹⁵⁹ The nature of these agreements shows that international cooperation in antitrust laws is not motivated by a desire of restraint, but by a desire to effectively enforce each state's own antitrust laws. In other words, international anti-competitive cooperation is realized by the gathering of various states that have common interests in preventing similar "anti-competitive" actions.

III. COMMON INTERESTS UNDER THE VEIL OF COOPERATION

The best examples that reflect state economic interests as a priority in antitrust laws and policy are the *Boeing/McDonnell Douglas* and *GE/Honeywell* mergers. In both cases, the European Commission blocked the mergers between two U.S. companies after the U.S. government cleared the merger. While both governments gave evidence supporting their decisions, the conflicting decisions did not merely come from differing policies in antitrust laws.

¹⁵⁴ 2012 INCSR: *Treaties and Agreements*, U.S. DEP'T OF STATE (Mar. 7, 2012), <http://www.state.gov/j/inrl/rls/nrcrpt/2012/vol2/184110.htm>.

¹⁵⁵ *Annex 1-C*, U.S. DEP'T OF JUST., <http://www.justice.gov/atr/annex-1-c> (last updated June 25, 2015).

¹⁵⁶ Tappan & Byers, *supra* note 152, at 2.

¹⁵⁷ *Annex 1-C*, *supra* note 155.

¹⁵⁸ *Id.* at 7.

¹⁵⁹ *Id.* at 8; Tappan & Byers, *supra* note 152, at 2.

A. Boeing/McDonnell

In December 1996, the Boeing Company announced its plans to acquire McDonnell Douglas.¹⁶⁰ The merger would make Boeing the sole American manufacturer of commercial-jet aircrafts and the United States' second largest defense contractor, and would also increase its market share to two-thirds of the worldwide market.¹⁶¹ The Federal Trade Commission (FTC) reviewed the *Boeing/McDonnell Douglas* merger, and after a lengthy investigation, decided not to challenge the merger.¹⁶² The FTC published a brief explanation on July 1, 1997, stating that "the acquisition would not substantially lessen competition . . . in either defense or commercial aircraft markets."¹⁶³ It also found that McDonnell Douglas would no longer constitute a meaningful competitive force, and that there was no other economically plausible strategy that it could follow.¹⁶⁴ The brief concluded that after a lengthy and detailed investigation, the FTC found that McDonnell Douglas was no longer in a position to significantly influence the competitive dynamics of the commercial aircraft market.¹⁶⁵

On the other hand, the European Commission (EC) did not view the merger so benignly and objected to it in May 1997.¹⁶⁶ On July 4, 1997, a fifteen-member advisory panel unanimously recommended that the EC block the merger.¹⁶⁷ The EC was concerned that the merger would increase Boeing's customer base from sixty percent to eighty-four percent of the worldwide market share.¹⁶⁸ It believed that the merger would give Boeing an increased advantage in negotiating with customers for exclusive supply arrangements and enhanced access to government-funded research and development.¹⁶⁹

¹⁶⁰ Salil K. Mehra, *Extraterritorial Antitrust Enforcement and the Myth of International Consensus*, 10 DUKE J. COMP. & INT'L L. 191, 212 (1999).

¹⁶¹ *Id.*

¹⁶² Eric J. Stock, *Explaining the Differing U.S. and EU Positions on the Boeing/McDonnell-Douglas Merger: Avoiding Another Near-Miss*, 20 U. PA. J. INT'L ECON. L. 825, 840 (1999).

¹⁶³ Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steigner, Roscoe B. Starek, III and Christine A. Varney in the Matter of the Boeing Company/McDonnell Douglas Corporation, Fed. Trade Commission (July 1, 1997), <https://www.ftc.gov/public-statements/1997/07/statement-chairman-robert-pitofsky-commissioners-janet-d-steiger-roscoe-b> [hereinafter Statement of Chairman Robert Pitofsky et al.]; Mehra, *supra* note 160, at 212.

¹⁶⁴ Statement of Chairman Robert Pitofsky et al., *supra* note 163; Mehra, *supra* note 160, at 212–13.

¹⁶⁵ Mehra, *supra* note 160, at 213.

¹⁶⁶ *Id.*

¹⁶⁷ Stock, *supra* note 162, at 840–41.

¹⁶⁸ Mehra, *supra* note 160, at 213.

¹⁶⁹ *Id.* at 213–14.

Heated negotiations and political debates ensued, and President Clinton threatened the EU, stating that the United States would impose trade sanctions if it decided to block the merger.¹⁷⁰ Fortunately, the EC decided to approve the merger following several concessions made by Boeing during settlement, which required Boeing to significantly change the future operation of the company to avoid sanctions and litigation.¹⁷¹

Some simply dismiss the *Boeing/McDonnell Douglas* merger as a result of different philosophies and assumptions.¹⁷² However, others, namely U.S. officials, saw other concerns at work during negotiations with the EC:¹⁷³ Airbus Industries, Boeing's major (and subsequently only) competitor, had been subsidized by four governments of the EC's member states.¹⁷⁴

B. GE/Honeywell

Four years after the *Boeing/McDonnell Douglas* feud, the EC once again rejected—this time completely—the *GE-Honeywell merger* subsequent to the approval of U.S. regulators.¹⁷⁵ General Electric (GE) was the world's largest jet engine producer for commercial and military aircraft, while Honeywell was the leading producer of aerospace products.¹⁷⁶ After the United States gave a green light to the world's largest proposed merger between GE and Honeywell, the EC stopped the deal from going through.¹⁷⁷

Among other things, the EC raised concerns of bundling,¹⁷⁸ which is the practice of mixing multiple product lines and offering financial incentives to customers to purchase the whole package.¹⁷⁹ In response to the EC's decision, the U.S. Assistant Attorney General in charge of the Antitrust Division issued a press release stating that bundling was an efficiency-promoting activity that

¹⁷⁰ Stock, *supra* note 162, at 841.

¹⁷¹ *Id.*

¹⁷² Stock, *supra* note 162, at 863.

¹⁷³ Mehra, *supra* note 160, at 214.

¹⁷⁴ *Id.* at 214–15.

¹⁷⁵ See generally David S. Evans & Michael Salinger, *Competition Thinking at the European Commission: Lessons from the Aborted GE/Honeywell Merger*, 10 GEO. MASON L. REV. 489 (2002).

¹⁷⁶ Eleanor M. Fox, *Mergers in Global Markets: GE/Honeywell and the Future of Merger Control*, 23 U. PA. J. INT'L ECON. L. 457, 460 (2002).

¹⁷⁷ *Id.* at 461–63.

¹⁷⁸ *Id.* at 461–62.

¹⁷⁹ Barbara T. Sicalides, *United States Antitrust Law Related to Bundling, Loyalty Discounts and Slotting Allowances*, PEPPER HAMILTON LLP (Oct. 5, 2007), http://www.pepperlaw.com/publications/united-states-antitrust-law-related-to-bundling-loyalty-discounts-and-slotting-allowances-2007-10-05/#_ftn6.

would lower the prices of the products and benefit consumers.¹⁸⁰ However, the EC argued that prices would be lowered only in the short-term and eventually rise thereafter.¹⁸¹ Behind the scenes of these inter-governmental exchanges, Rolls Royce and United Technologies were involved in a ferocious lobby against the merger, once again showing the influence of state or regional economic interest in major antitrust decisions.¹⁸²

IV. DEVELOPING COUNTRIES IN A NINETEENTH CENTURY NATION-STATE

A. *Small Economies Not Only Lack the Resources to Promulgate and Enforce Antitrust Laws, but Also Lack the Incentives To Do So*

The sequence of events during the *Boeing/McDonnell Douglas* negotiations and its outcome is not surprising. Although globalization of business has significantly changed, the fundamental political paradigm of international politics has not changed since the Treaty of Westphalia in 1648, in which states act as individual entities acting in their own interests.¹⁸³ The nature of the international agreements made between the states and the *Boeing/McDonnell Douglas* and *GE/Honeywell* negotiations show that state interest is the main impetus for negotiations and agreements.¹⁸⁴ Thus, international cooperation cannot be an effective restraint on extraterritorial application of antitrust laws. Cooperation through bilateral and multilateral agreements is usually voluntary,¹⁸⁵ which has certain implications. First, each country chooses the countries it wants to cooperate with.¹⁸⁶ Second, the agreements generally give each party the right to decide whether it will cooperate on a case-by-case basis.¹⁸⁷ However, small economies, including developing states, feel the biggest and most negative impact as a result of cooperation motivated by economic state interest; these states have less interest in applying antitrust laws domestically and extraterritorially and lack the power and ability to enforce such antitrust laws.

¹⁸⁰ Fox, *supra* note 176, at 463.

¹⁸¹ *Id.* at 464–65.

¹⁸² Michael Elliott, *The Anatomy of the GE-Honeywell Disaster*, TIME (July 8, 2001), <http://content.time.com/time/business/article/0,8599,166732,00.html>.

¹⁸³ Ellis, Jr., *supra* note 115, at 477; see Philip G. Cerny, *Globalization and Other Stories: The Search for a New Paradigm for International Relations*, 51 INT'L J. 617–23 (1995–1996).

¹⁸⁴ See generally Mehra, *supra* note 160; Evans & Salinger, *supra* note 175.

¹⁸⁵ Frederic Jenny, *International Cooperation on Competition: Myth, Reality, and Perspective*, ANTITRUST BULL., Winter 2003, at 973, 979.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

Small economies are also disadvantaged in that they do not have the proper resources to be a credible threat to international cartels in enforcing antitrust laws.¹⁸⁸ According to a study conducted by Abel Mateus, many countries around the world, including developed countries, did not provide enough resources for the respective National Competition Authorities (NCA) for effective competition law enforcement.¹⁸⁹ Not only is a GDP per capita above \$13,500 required for an effective competition law enforcement regime, but such regimes are only necessary with a GDP per capita above \$3,500.¹⁹⁰ This means that competition law enforcement may impose heavy costs on the country, while the loss may be minimal to a given business.¹⁹¹

Small economies with limited ability and resources to govern conduct of foreign firms usually only have the power to deny access to domestic markets.¹⁹² In addition, if trade in a small economy is only a fraction of the foreign firm's global operations, the foreign firm will be less reluctant to withdraw its business from the country.¹⁹³ Thus, the negative effects on the small economy might be greater than the negative effects the foreign firm might feel while continuing operations within the small economy's borders.¹⁹⁴ With this in mind, large foreign importers often explicitly or implicitly threaten to exit the small economy when the small economy attempts to impose limitations upon them under anti-competition laws.¹⁹⁵

Michal S. Gal conducted an empirical study that supports the view that smaller and developing countries lack the power and incentives to enforce competition laws.¹⁹⁶ According to the study, sixty-nine percent of small and developing jurisdictions did not bring any monopolization charges against foreign firms.¹⁹⁷ Nineteen percent brought only three or fewer suits, and only

¹⁸⁸ Gal, *Antitrust*, *supra* note 147, at 3.

¹⁸⁹ Abel Mateus, *Competition and Development*, in COMPETITION LAW AND DEVELOPMENT 115, 136 (D. Daniel Sokol et al. eds., 2013).

¹⁹⁰ *Id.* These numbers were reached using the World Bank Governance data, the database on institutions and policy from the Inter-American Development Bank, the World Bank Doing Business database, the Global Competitiveness Report of the World Economic Report 2010–2011, and various data available from the World Bank. *Id.* at 129–32.

¹⁹¹ See Andrew T. Guzman, *Competition Law and Cooperation*, in COOPERATION, COMITY, AND COMPETITION POLICY 345, 345–46 (Andrew T. Guzman ed., 2011).

¹⁹² *Id.* at 346.

¹⁹³ Gal, *Antitrust*, *supra* note 147, at 31–32.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 32.

¹⁹⁶ See *id.* at 31–37.

¹⁹⁷ *Id.* at 25.

eleven percent brought more than three cases of monopolization charges against foreign firms in the course of five years.¹⁹⁸

Although this threat imposed by large firms upon small economies is not common, Microsoft's reaction to Israel's competition requirements shows the disadvantage that small economies have against large firms: Microsoft refused to enter into agreements with Israel despite the fact that it entered into similar agreements with the EU.¹⁹⁹ Unfortunately, the implied threat of Microsoft's exit from Israel had far more dire consequences to Israel than to Microsoft—Microsoft would have suffered a loss in profits, while Israel would have been left with no Hebrew-supported operating systems.²⁰⁰ The weak enforcement regimes of smaller economies as well as their lack of motivation to enforce competition law may make them a likely target for international cartels.

The threat of competition law enforcement on large firms is not limited to international cartels. Many developing countries have an economy based on a small group of elites.²⁰¹ This means that the enforcement of competition law on some of the firms may result in loss of funding if it affects those who have strong political ties with the government.²⁰² Many large foreign firms even have strong ties with high-ranking government officials and the business elite, sometimes resulting in political pressure against the implementation of competition law against these entities.²⁰³

There is no doubt that small economies benefit from the strict extraterritorial application of anti-competition laws on foreign firms by “free-riding.”²⁰⁴ Yet, at the same time, smaller economies have very little power to improve their bargaining position during negotiations of international agreements on anti-competition laws, resulting in agreements that usually favor the interests of larger countries.²⁰⁵ That is why small economies remain marginal and passive players in the global antitrust regime, forced to bear the

¹⁹⁸ *Id.* The major outlier among smaller and developing countries was Zambia. However, the Zambian government brought such actions to receive concessions in order to reduce prices or change trading conditions. *Id.*

¹⁹⁹ Michal S. Gal, *Extraterritorial Application of Antitrust—The Case of a Small Economy*, in COOPERATION, COMITY, AND COMPETITION POLICY 97, 114 (Andrew T. Guzman ed., 2011) [hereinafter Gal, *Extraterritorial Application*].

²⁰⁰ Gal, *Antitrust*, *supra* note 147, at 32–33.

²⁰¹ KISHWAR SULTANA, THE ROLE OF ELITES IN ECONOMIC DEVELOPMENT 5 (2009).

²⁰² See Gal, *Antitrust*, *supra* note 147, at 36–37.

²⁰³ *Id.*

²⁰⁴ Gal, *Extraterritorial Application*, *supra* note 199, at 116.

²⁰⁵ *Id.* at 118.

effects of international anticompetitive conduct and enforcement actions of larger economies—whether good or bad.²⁰⁶

Small economies are not only weaker players in the global antitrust regime, but also may sometimes be excluded from cooperation. There are very few agreements between developed and developing countries, as shown in a 2001 OECD questionnaire, answered by thirteen members and twelve nonmembers.²⁰⁷ The Secretariat's observations showed that cooperation was limited only to particular states, mostly those that shared common systems or concepts or cartel activity, such as the European Commission and EU member states, Canada, and the United States.²⁰⁸

It is noteworthy that many states that aggressively apply extraterritorial antitrust laws and cooperate with the United States are both top ten exporters and top ten importers with the United States.²⁰⁹ This phenomenon is not only attributed to the lack of resources and incentives for the smaller economies, but also to the potential reluctance of larger economies to enter into cooperative agreements with these smaller economies. Larger international firms from larger economies usually have higher market shares than the smaller firms in smaller economies.²¹⁰ Thus, the larger economies might be exposed to numerous requests for assistance while they will not benefit as much from the agreement as smaller economies.²¹¹ This means that larger jurisdictions will probably be reluctant to enter into cooperative agreements with smaller economies because of the probability that their larger firms might be subject to investigation by the competition authorities of smaller economies.²¹²

B. South Korea: From a Developing Country to a Developed Country—Prior to International Normalization of Antitrust Laws

While the case of smaller and developing countries still remains largely a theoretical concern, the specific case of South Korea provides useful insight.

²⁰⁶ *Id.* at 98.

²⁰⁷ Jenny, *supra* note 185, at 990.

²⁰⁸ *Id.* at 990–91.

²⁰⁹ Australia, Brazil, Canada, China, the EU, Japan, and South Korea are top players in anti-cartel enforcement and are among both the top ten exporters and the top ten importers with the United States. *See United States Trade Statistics*, GLOBALEDGE, <http://globaledge.msu.edu/countries/united-states/tradestats> (last visited Feb. 3, 2017); ALLEN & OVERY, *supra* note 130, at 3–6, 9–10.

²¹⁰ Jenny, *supra* note 185, at 979.

²¹¹ *See id.*

²¹² *Id.*

South Korea is a small country with a land mass of 38,691 square miles—which is only about twenty percent of the total land mass of California.²¹³ Despite its size, South Korea transformed from a foreign aid recipient after the Korean War to the eleventh largest economy in the world in 2006.²¹⁴ In addition, it has one of the most active antitrust enforcement mechanisms, ranking fourth in terms of highest global cartel fine levels.²¹⁵ Many refer to this rags-to-riches growth as the “Miracle on the Han River.”²¹⁶ One of the reasons for the economic success of South Korea is attributable to the government’s planned economic efforts that resulted in the creation and establishment of *chaebols*, Korea’s big business conglomerates.²¹⁷ Korea’s economic success through the creation and dominance of *chaebols*, as well as its subsequent implementation of antitrust laws, illustrates how growing antitrust enforcement and cooperation mechanisms may not actually be beneficial for developing countries, as the U.S. government often claims.

In the early 1950s, South Korea was a war-torn country that relied heavily on foreign aid for survival.²¹⁸ With the few assets that were left by Japanese colonialists, South Korean businessmen started new businesses that helped rebuild the country.²¹⁹ As Park Chung Hee installed himself as the leader of the military-dominated regime, he quickly implemented a series of five-year plans to achieve economic prosperity.²²⁰ The government was deeply involved in the financial structure of South Korea. It specifically decided which markets it would develop through certain firms and focused on export-oriented

²¹³ *How Big is South Korea in Comparison to the United States, Germany, Japan and UK?*, TRAVELER’S DIGEST (Feb. 26, 2014), <http://www.travelersdigest.com/7040-how-big-is-south-korea-in-comparison-to-the-united-states-germany-japan-uk/>.

²¹⁴ *Facts About South Korea*, KOREA ECON. INST. AM. (June 2014), http://keia.org/sites/default/files/publications/kei_factsonkorea_june2014.pdf; see Richard Dobbs & Roland Villinger, *Four Steps to Prosperity*, in *SOUTH KOREA: FINDING ITS PLACE ON THE WORLD STAGE* (McKinsey & Co. 2010), <http://www.mckinsey.com/global-themes/asia-pacific/south-korea-finding-its-place-on-the-world-stage>.

²¹⁵ See ALLEN & OVERY, *supra* note 130, at 2.

²¹⁶ Wonsik Choi & Richard Dobbs, *Renewing the South Korean Miracle*, MCKINSEY & COMPANY (Feb. 22, 2013), <http://www.mckinsey.com/mgi/overview/in-the-news/renewing-the-south-korean-miracle>.

²¹⁷ See generally DAVID MURILLO & YUN-DAL SUNG, ESADEGEO, *UNDERSTANDING KOREAN CAPITALISM: CHAEBOLS AND THEIR CORPORATE GOVERNANCE I* (Sept. 2013).

²¹⁸ See Carter J. Eckert, *Korea’s Economic Development in Historical Perspective, 1945-1990*, in *PACIFIC CENTURY* 292–93 (M. Borthwick ed., 1992).

²¹⁹ Charlotte Marguerite Powers, *The Changing Role of Chaebol*, 10 *STAN. J. E. ASIAN AFF.* 105, 106 (Summer 2010).

²²⁰ EDWARD M. GRAHAM, *REFORMING KOREA’S INDUSTRIAL CONGLOMERATES* 14–16 (2003) https://piie.com/publications/chapters_preview/341/2iie3373.pdf; Park Chung Hee, *ENCYCLOPÆDIA BRITANNICA*, <https://www.britannica.com/biography/Park-Chung-Hee> (last visited Feb. 3, 2017).

industrialization.²²¹ The government also provided various financial incentives, such as low-interest loans and tax breaks, to businesses that were willing to adhere to its official development programs.²²² Firms that were carefully selected by the government to receive preferential treatment grew to become the conglomerate *chaebols*, and they were left to themselves as long as they followed the government's development plans and created jobs.²²³ Industrialization through the *chaebols* brought about significant economic growth, resulting in an annual economic growth of ten percent by 1971.²²⁴

With the rise and dominance of the *chaebols*, South Korea repeated the United States' experience when the public began to recognize the need to contain monopolistic and oligopolistic behavior.²²⁵ To address this public outcry, the government drafted a new competition law in 1964 to regulate prices and contract terms.²²⁶ However, this bill was met with strong objections from the business sector.²²⁷ Government efforts to pass antitrust laws persisted as antitrust bills were submitted in 1966, 1967, and 1971, all of which failed to pass the majority threshold or even reach the National Assembly.²²⁸ Finally, the first set of antitrust laws, the MRFTA, was enacted in 1980.²²⁹ Unfortunately, the MRFTA did not alleviate the increasing economic concentration—in two years, the number of *chaebols* with assets over 400 billion Korean Won increased from thirty-two to forty-three.²³⁰

It was not until the Asian financial crisis of 1997 that the MRFTA had a significant impact on antitrust regulation. During the crisis, the South Korean banking sector collapsed and the *chaebols* had to turn to the government for help.²³¹ To deal with the crisis, the government turned to the International Monetary Fund (IMF) for a fifty-seven billion dollar loan, but with certain conditions, including trade liberalization and the reform of the MRFTA.²³² The time was ripe for this transition into actual enforcement of antitrust laws

²²¹ Eckert, *supra* note 218, at 296; Powers, *supra* note 219, at 106–07.

²²² Powers, *supra* note 219, at 106.

²²³ *Id.* at 106–07.

²²⁴ Youngjin Jung & Seung Wha Chang, *Korea's Competition Law and Policies in Perspective Symposium on Competition Law and Policy in Developing Countries*, NW. J. INT'L L. & BUS. 687, 688 (2006).

²²⁵ *Id.* at 690.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 690–91.

²²⁹ *Id.* at 691.

²³⁰ *Id.* at 693.

²³¹ *See id.* at 694.

²³² *See id.*; MURILLO & SUNG, *supra* note 217, at 5.

because of the public perception that the *chaebols* were the main cause of the financial crisis.²³³ Since then, South Korea has reached the forefront of antitrust enforcement, becoming one of the few countries to impose fines on the international vitamin cartel case, which involved Hoffman-La Roche.²³⁴

An overview of South Korea's economic and legal development reveals that the main thrust behind the promulgation and enforcement of antitrust laws is state economic interests. It also shows that the timing of antitrust law enactment is an important factor for sound economic development as well as effective enforcement. Pressures for trade liberalization and antitrust law enforcement on South Korea did not emerge until the IMF crisis in 1997, allowing the country to grow into a manufacturing and exporting powerhouse. This was made possible by the protectionist and "anticompetitive" policies that helped nurture and incubate businesses, or *chaebols*, that would later become resilient in the global market.²³⁵ After the *chaebols* reached a certain growth, owning up to forty-five percent of the Korean market, these conglomerates had the ability to withstand the strict antitrust enforcements levied by the government. South Korea was very fortunate to realize such astounding economic growth before antitrust laws became the international norm among trading superpowers,²³⁶ but what about the small and developing countries today?

Small and developing countries today do not enjoy the option of insulating their own businesses as South Korea did. Various supranational bodies, including the WTO, have been pressuring developing countries to liberalize trade and adopt competition laws, pointing to the writings of academics that promise a positive relationship between competition law and development.²³⁷

²³³ See Jung & Chang, *supra* note 224, at 694. See generally Keun S. Lee, *Financial Crisis in Korea and IMF: Analysis and Perspectives*, MERILL LYNCH CTR. STUDY INT'L FIN. SERVS. & MKTS. (Feb. 27, 1998), http://www.hofstra.edu/pdf/biz_mlc_lee1.pdf.

²³⁴ Jung & Chang, *supra* note 224, at 707.

²³⁵ The market value of each of Korea's top ten firms exceeded twenty billion, with Samsung Electronics having a market value of \$186.5 billion. Kibo Sim, *Top 10 Korean Businesses in the World*, FRESHTAX, <http://blog.btrax.com/en/2015/03/23/top-10-korean-businesses-in-the-world-2015/> (last visited Feb. 3, 2017). In 2014, Samsung Electronics earned the highest global TV market share with 28.3%. SAMSUNG, 2014 SAMSUNG ELECTRONICS ANN. REP. (2014), http://www.samsung.com/common/aboutsamsung/download/companyreports/2014_E.pdf.

²³⁶ This proposition does not impliedly support the Korean *chaebol* system existing today. It merely recognizes the advantage *chaebols'* growth had on South Korea's overall economy during its initial stages of economic development.

²³⁷ Dina I. Waked, *Competition Law in the Developing World: The Why and How of Adoption and Its Implications for International Competition Law*, 1 GLOBAL ANTITRUST REV. 69, 70–75 (2008).

In addition, the effects of *Hartford Fire*, which made the extraterritorial application of antitrust law more broad, exerted pressure on small and developing states to adopt their own stringent antitrust laws.²³⁸ This leads to the inference that extraterritorial antitrust laws benefit developed nations with substantial trade interests, while depriving developing nations of the opportunity that South Korea had until the 1990s. This too is a theoretical scenario, but one that scholars and law enforcement must consider when applying antitrust laws extraterritorially to the possible detriment of developing countries. The *Boeing/McDonnell Douglas* merger and the *GE/Honeywell* merger gained public recognition only because they involved two major state actors. It is doubtful whether smaller and developing countries will benefit from such publicity when similar merger approvals or prohibitions take place against them.

V. A RETURN TO INTERNATIONAL COMITY PRINCIPLES

Recognizing the conflicting antitrust laws of various nations, scholars have tried to address the issue by suggesting a greater convergence through supranational organizations, such as the WTO.²³⁹ However, those scholars have failed to consider that cooperation between states towards uniform antitrust laws is possible only to the extent that all states' interests converge. In addition, this solution does not consider the disadvantages that small and developing economies face. Thus, it is not only unrealistic to have a globalized antitrust regime, but such a regime would potentially have harmful economic effects on small and developing countries.

To address the dilemma faced by developing countries, this Comment suggests that the U.S. courts return to the international comity principles that were first mentioned in *Timberlane*, but were practically ignored in the *Hartford Fire* majority opinion. Although *Hartford Fire* did not completely dismiss the comity principle, it limited its application only to instances when there is a "true conflict" between domestic and foreign law.²⁴⁰

²³⁸ See *Working Group Set up by Singapore Ministerial*, WORLD TRADE ORG. (2001), https://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief13_e.htm. Fifty developing countries have adopted antitrust laws. *Id.*

²³⁹ See, e.g., Eric Engle, *The Globalization of Antitrust and Competition Law*, 21 CURRENTS INT'L TRADE L.J. 3, 13 (2012–2013).

²⁴⁰ *Hartford Fire Ins. Co. v. Calif.*, 509 U.S. 764, 798.

However, the principle of comity was not completely ignored by the Supreme Court. In the *Hartford Fire* dissent, the late Justice Antonin Scalia used what he called “prescriptive comity” to limit the application of the Sherman Act.²⁴¹ He believed that it was important that the courts consider the legitimate interests of other countries, albeit without the idea in mind that extraterritorial application would potentially harm developing countries.²⁴² These comity principles were assumed to be incorporated into U.S. laws, having extraterritorial application in the absence of contrary congressional direction. Thus, according to Justice Scalia, comity considerations were part of the analysis of whether the Sherman Act prohibited the conduct at issue.

Justice Scalia referred to the Restatement (Third) of Foreign Relations Law of the United States to elaborate on how to apply prescriptive comity to the Sherman Act.²⁴³ The Restatement states that a nation should refrain from exercising jurisdiction if such jurisdiction is unreasonable, even if it has a basis for exercising that jurisdiction.²⁴⁴ Justice Scalia listed various factors from the Restatement to determine whether the exercise of jurisdiction is unreasonable, including the following:

- (a) “the extent to which the activity takes place within the territory [of the regulating state],”²⁴⁵
- (b) “the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated,”²⁴⁶
- (c) “the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted,”²⁴⁷
-
- (g) “the extent to which another state may have an interest in regulating the activity,”²⁴⁸ and

²⁴¹ *Id.* at 817.

²⁴² *Id.* at 820.

²⁴³ *See id.* at 818–19.

²⁴⁴ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1) (1987).

²⁴⁵ *Id.* § 403(2)(a).

²⁴⁶ *Id.* § 403(2)(b).

²⁴⁷ *Id.* § 403(2)(c).

²⁴⁸ *Id.* § 403(2)(g).

- (h) “the likelihood of conflict with regulation by another state.”²⁴⁹

The first factor reflects the tension between *American Banana* and *Alcoa*, requiring the balancing between the territoriality and the effects doctrines. The second factor considers the territoriality and effects doctrines, while also including the nationality element for balancing. The third, fourth, and fifth factors are based on comity principles.

These various comity considerations are from a clear-cut rule for deciding whether to apply extraterritorial jurisdiction. It would be naïve to believe that any list of factors will provide a clear solution, as evidenced by the increased confusion caused by the FTAIA.²⁵⁰ However, it does provide a basic framework on which the courts and law enforcement can at least begin considering the negative effects of extraterritorial antitrust application, in addition to domestic effects. Namely, factor (g) considers the extent of the other state’s interest in regulating the activity.²⁵¹ This factor includes an analysis of the relative economic effects of the regulation, or absence thereof, to both the regulating and regulated state.

However, U.S. judges are not economic analysts, and many—if not most—do not have the necessary economic expertise to conduct such analysis. Thus, these comity principles should first be adopted by the Federal Trade Commission and the Antitrust Division of the DOJ. This adoption should be more than merely written guidelines—such as the 1995 Guidelines that listed factors for comity considerations—and begin to take the form of action.

One may ask why U.S. antitrust laws must reflect the interests of other states. As the First Circuit said in *Nippon Paper*, “[c]omity is more an aspiration than a fixed rule, more a matter of grace than a matter of obligation.”²⁵² However, the Second Circuit, in vacating a \$147 million antitrust judgment against two Chinese companies, recently repeated the Supreme Court’s sentiment that the principle of international comity “is not

²⁴⁹ *Id.* § 403(2)(h). While the Restatement (Third) lists eight total factors, the most pertinent factors for this Comment have been listed here.

²⁵⁰ In fact, the First Circuit even refused to give it any weight in deciding whether extraterritorial application was proper because of the ambiguity of the statute. *United States v. Nippon Paper Indus. Co., Ltd.*, 109 F.3d 1, 4 (1st Cir. 1997) (“The FTAIA is inelegantly phrased and the court in *Hartford Fire* declined to place any weight on it. . . . We emulate this example and do not rest our ultimate conclusion about Section One’s scope upon the FTAIA.”).

²⁵¹ Restatement (Third) of Foreign Relations Law of the United States § 403(2)(e).

²⁵² *Id.* at 8.

just a vague political concern favoring international cooperation when it is in our interest to do so [but r]ather it is a principle under which judicial decisions reflect the systemic value of reciprocal tolerance and goodwill.”²⁵³ U.S. antitrust laws, as with competition laws of other states, were promulgated in reaction to domestic interests to address the public concerns about the trust problem.²⁵⁴ Antitrust policy concerned not only consumer welfare, but also market allocative efficiency,²⁵⁵ which is why “[m]ost economists agree that antitrust policy should balance the potential harm from greater concentration of market power with the benefits offered by large enterprises with economies of scale.”²⁵⁶ The United States took this approach to a highly pragmatic level during World War I, when it took antitrust enforcement actions against German agents, but relaxed antitrust enforcement against domestic entities to bolster its economy.²⁵⁷ Thus, antitrust law and its enforcement were accurately tailored to the domestic needs of the United States. These antitrust laws, once tailored to domestic interests, are now being applied extraterritorially to further fit the needs of the nation within the context of a globalizing economy. Therefore, should not U.S. antitrust policies also begin to consider consumer welfare and market efficiencies within the global context? Studies about antitrust laws and their implications to developing countries have usually focused on the form antitrust laws should take and their enforcement limitations. Little to no work has been done to address the potential disadvantages developing countries face before extraterritorial enforcement of antitrust laws. Thus, further detailed research and analysis concerning the market effects on developing countries caused by extraterritorial enforcement of antitrust laws should be conducted.

²⁵³ *Animal Sci. Prods. v. Hebei Welcome Pharm. Co. (In re Vitamin C Antitrust Litigation)*, 837 F.3d 175, 183 (2d Cir. 2016) (quoting *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist.*, 482 U.S. 522, 555 (1987)) (alteration in original). Though the Second Circuit’s decision is commendable for its impartiality, the principle of international comity was applied because the defendants could not comply with both U.S. and Chinese antitrust laws because they were in conflict with each other. *Id.* at 192. This is consistent with the limitations set by *Hartford Fire*. See *Hartford Fire Ins. Co. v. Calif.*, 509 U.S. 764 (1993). This Comment argues that such a limited application is insufficient, and that the U.S. courts and legislature should consider the economic disadvantages posed to small and developing countries when deciding a case and passing laws.

²⁵⁴ Arthur, *supra* note 6, at 446–47.

²⁵⁵ Daniel A. Crane, *The Economics of Antitrust Enforcement*, in *ANTITRUST LAW AND ECONOMICS 2* (Keith N. Hylton ed., 2010); Steven J. Markovich, *U.S. Antitrust Policy*, COUNCIL ON FOREIGN REL. (Feb. 6, 2014), <http://www.cfr.org/corporate-regulation/us-antitrust-policy/p29984>.

²⁵⁶ Markovich, *supra* note 255.

²⁵⁷ See *supra* text accompanying notes 38–41.

CONCLUSION

The United States was the first to apply its antitrust laws extraterritorially, becoming one of the most active global enforcers of its antitrust laws. Others, including Brazil, the EU, Japan, and South Korea soon followed, creating an environment that accepts extraterritorial application of stringent antitrust laws as the international norm. Small and developing countries have thus been pressured to accept foreign enforcement and promulgate their own laws that emulate those of the United States and the EU. This may have potentially negative effects on the economies of smaller and developing countries, even taking away the opportunities of economic growth that South Korea was able to enjoy. However, the history of U.S. and South Korean antitrust laws, as well as the conflict in the Boeing/McDonnell Douglas merger, reveal that state interest is one of the main impetuses of antitrust promulgation and enforcement. With this assumption in mind, U.S. courts and antitrust enforcement agencies must restore the international comity principles that Justice Scalia referred to as “prescriptive comity” in his *Hartford Fire* dissent.²⁵⁸ This prescriptive comity must consider the negative potential consequences that extraterritorial antitrust application may have on certain small and developing countries. Again, little study has been conducted in this matter, and efforts to consider comity principles of smaller and developing states should begin with research and analysis of the actual effects of extraterritorial antitrust laws on these states.

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²⁵⁸ *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993).

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